No. 87-1902

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED-GENERAL NUCLEAR SERVICES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 839 F.2d 1572. The opinion of the United States Claims Court (Pet. App. 13a-54a) is reported at 12 Cl. Ct. 372.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a) was entered on February 24, 1988. The petition for a writ of certiorari was filed on May 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the end of World War II, Congress adopted the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755, which prohibited the private possession and use of nuclear

energy technology. Eight years later, however, Congress enacted the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* (AEA), which provides that private entities may possess and use "special nuclear material" if they obtain a license from the Nuclear Regulatory Commission (Commission).[1] See 42 U.S.C. 2014(v)(1), 2131. The AEA defines "special nuclear material" as plutonium, enriched uranium, and other substances that are capable of releasing substantial quantities of atomic energy. See 42 U.S.C. 2014(aa).

The AEA establishes a two-step licensing procedure for entities that want to possess or use nuclear technology and materials. First, an applicant must receive a permit from the Commission to construct a facility for the possession or use of special nuclear materials. See 42 U.S.C. 2014(v), 2014(aa), 2014(cc), 2131, 2133, 2235, 2239; 10 C.F.R. 50.10(b), 50.23, 50.55. Second, the applicant, after completing construction, must obtain an operating license from the Commission. See 42 U.S.C. 2133, 2137, 2232, 2235; 10 C.F.R. 50.56, 50.57. The AEA provides that the Commission may not issue a license if it believes that such a license "would be inimical to the common defense and security or to the health and safety of the public" (42 U.S.C. 2133(d)).

2. This case concerns nuclear fuel. Most nuclear power plants in this country are fueled by slightly enriched uranium dioxide. As the fuel enters the reactor, the uranium consists of about three percent uranium-235 and 97% uranium-238. *Westinghouse Elec. Corp.* v. *NRC*,

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[1] The AEA created the Atomic Energy Commission to administer the statute. In 1975, Congress abolished the Atomic Energy Commission and created the Nuclear Regulatory Commission to assume all licensing and related regulatory functions. See 42 U.S.C. 5814(a), 5841(f). We use the word "Commission" to refer to either the Atomic Energy Commission or the Nuclear Regulatory Commission.

598 F.2d 759, 762 n.4 (3d Cir. 1979). During the controlled nuclear chain reaction, the uranium-235 atoms fission into lighter atoms and some of the uranium-238 atoms transmute into plutonium, which also may fission (*ibid.*). Fission products impede the nuclear chain reaction. Accordingly, nuclear fuel must be removed from the reactor as "spent" and replaced with fresh fuel before the uranium and plutonium in the fuel are completely expended. *Ibid.* Spent nuclear fuel, therefore, contains uranium and plutonium that may be separated from the fission waste products and made into new nuclear fuel (*ibid.*). In the separation process, plutonium must be isolated from the radioactive waste. This fact gives rise to great concern because plutonium may be used by foreign governments or terrorists to build nuclear weapons. *Id.* at 763.

On February 1, 1970, petitioner Allied-General Nuclear Services (AGNS) was formed to construct a nuclear fuel reprocessing plant in Barnwell, South Carolina. The Commission granted AGNS a construction permit for the plant on December 18, 1970. AGNS began construction in February 1971. In July 1971, the United States Court of Appeals for the District of Columbia Circuit set aside many of the Commission's rules implementing the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA). See *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 449 F.2d 1109 (1971). The Commission promptly adopted new rules to provide for complete environmental reviews of nuclear projects. See 10 C.F.R. Pt. 50, App. E (1972). The Commission also set forth criteria by which to judge whether to suspend construction on projects before a NEPA review could be completed (*id.*, Para. E). Petitioners asked the Commission not to suspend construction on the Barnwell reprocessing plant. On November 30, 1971, the Commission granted petitioners' request and

allowed petitioners to "proceed with construction at their own risk" (36 Fed. Reg. 23333).

In February 1974, the Commission determined that any decision to permit nuclear fuel reprocessing on a large scale would require an environmental impact statement under Section 102(2)(c) of NEPA, 42 U.S.C. 4332(2)(C). *Westinghouse Elec. Corp.* v. *NRC*, 598 F.2d at 763. Thus, the Commission began work on a Generic Environmental Statement on Mixed Oxide Fuel (GESMO). See 39 Fed. Reg. 5356 (1974). The Commission published its first draft of GESMO in August 1974. See 39 Fed. Reg. 30186.

The Commission's draft GESMO prompted a number of critical comments. The President's Council on Environmental Quality stated that the draft was "incomplete because it fails to present a detailed and comprehensive analysis of the environmental impacts of potential diversion of special nuclear materials and of alternatives safeguard programs to protect the public from such a threat" (C.A. App. 84). The Council noted that the threat from the illicit use of plutonium "is so grave that it could determine the acceptability of plutonium recycle as a viable component of this Nation's nuclear electric power system" (*ibid.*). The Commission essentially agreed with those comments. In November 1975, therefore, the Commission announced that it would conduct a full assessment of issues regarding plutonium security before it decided whether to approve wide-scale nuclear fuel reprocessing. See 45 Fed. Reg. 53056-53057, 53059 (1980). Shortly thereafter, President Ford stated that the nation "should pursue reprocessing and recycling in the future only if they are found to be consistent with our international objectives" concerning the spread of nuclear weapons. Statement by the President on Nuclear Policy, 12 Weekly Comp. Pres. Doc. 1624, 1626 (Oct. 28, 1976).

3. President Carter outlined his policy on plutonium recycling on April 7, 1977. President Carter expressed deep concern about the risk that plutonium could be obtained from the recycling process and be used by foreign governments to make nuclear weapons. See statement on Nuclear Power Policy, 13 Weekly Comp. Pres. Doc. 506. President Carter stated that, in order to promote the government's international non-proliferation goals, his policy was to "defer indefinitely" domestic commercial plutonium recycling and to initiate a multinational evaluation of alternative fuel cycles.

In light of President Carter's statement, the Commission announced its intent to reassess "the future course and scope of GESMO, the review of recycle-related license applications, and the matter of interim licensing." 42 Fed. Reg. 22964 (1977). The Chairman of the Commission sought the President's views on those matters. A White House official responded that "the President believes that his non-proliferation initiatives would be assisted both domestically and internationally if the Commission were to terminate the GESMO proceedings * * * " (*id.* at 57186). On December 23, 1977, after receiving comments from interested parties, the Commission issued an order terminating the GESMO proceedings and most license proceedings relating to plutonium recycling. See *id.* at 65334. The Commission, however, stated that it would reexamine this decision after two studies of alternative fuel cycles were completed (*ibid.*; *Westinghouse Elec. Corp.* v. *NRC,* 598 F.2d at 765).

Petitioners and others sought judicial review of the Commission's order. The United States Court of Appeals for the Third Circuit upheld the Commission's action. The Third Circuit stated that, "[g]iven th[e] broad delegation of authority to the NRC to choose the necessary means by

which to implement the general policy objectives of the AEA, we cannot say that the NRC must inexorably proceed with the processing of license applications and the development of a final GESMO when in its judgment to do so would endanger the attainment of its statutory objectives." *Westinghouse Elec. Corp.* v. *NRC,* 598 F.2d 761, 771.

In early 1980, when the two studies regarding fuel cycles were complete, the Chairman of the Commission asked the President whether the Administration's views had changed. The White House responded that President Carter believed "that the GESMO proceedings should remain terminated and that a reopening of GESMO would be inimical to national security * * *." The Commission published this response and sought public comments on whether the Commission should reopen its GESMO and license proceedings. See 45 Fed. Reg. 53933 (1980). Neither petitioners nor any other applicant for a license to construct or operate a reprocessing facility responded.

In early 1981, President Reagan announced that he was "lifting the indefinite ban which previous administrations placed on commercial reprocessing activities in the United States." Statement Announcing a Series of Policy Initiatives on Nuclear Energy, Pub. Papers 903 (Oct. 8, 1981). President Reagan stated that it is "important that the private sector take the lead in developing commercial reprocessing services" (*ibid.*). Petitioners, however, have not sought to reopen either the GESMO proceedings or the proceeding concerning its application for a license to operate the Barnwell plant. Petitioners instead filed this suit alleging that the Commission's actions constitute a taking of the Barnwell reprocessing plant for public use without just compensation (C.A. App. 48, 51, 54, 55).

4. The United States Claims Court granted the government's motion for summary judgment. The court held that

petitioners' complaint is premature because petitioners have not sought to obtain a final ruling on their application for an operating license (Pet. App. 32a-36a). Alternatively, the court held that petitioners' property has not been taken without just compensation. The Claims Court noted that "the regulatory framework of the AEA was in place when [petitioners] acquired or generated the property interest which [they] allege[] has now been taken" (*id.* at 26a n.7). The court reasoned that the "regulatory action here, presumed to be valid, cannot be said to have involved considerations so unforeseeable that the public, rather than the plaintiff, should bear the burden of the loss" (*id.* at 31a).

The United States Court of Appeals for the Federal Circuit agreed that petitioners' Barnwell plant had not been taken without just compensation.[2] The court noted that the Commission suspended licensing proceedings because President Carter viewed the processing of spent fuel at Barnwell as a threat to the common defense of the United States (Pet. App. 9a). The court, relying on this Court's opinion in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* No. 85-1092 (Mar. 9, 1987), held that an uncompensated taking did not occur because the government used its police powers to protect the public from the threat of the spread of nuclear weapons. The court of appeals found "dispositive" the "basic rule that * * * as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public" (Pet. App. 8a).

The court of appeals also based its judgment on an independent ground. The court observed that petitioners built the Barnwell plant under a regulatory scheme that

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[2] The court of appeals ordered the Claims Court to dismiss petitioners' complaint with prejudice (Pet. App. 12a).

forbids the unlicensed operation of the plant and that requires the Commission "to take into account the common defense and security of the nation in passing on the licenses" (Pet. App. 10a). Petitioners built the plant with the knowledge that the Commission could use its licensing power in "unforeseen" circumstances—here, to prevent the risk of nuclear weapons (*ibid.*). The court of appeals stated that "the novelty of nuclear fission, the fearsome effect of its use in war, the public fears, all forbid us to suppose that the government had committed itself to use of its licensing power not to respond to some new ground of hesitation just because it was not originally foreseen" (*ibid.*).

Lastly, the court of appeals rejected petitioners' argument that there was a taking because the government encouraged petitioners to build the Barnwell plant (Pet. App. 11a-12a). The court noted that, although government employees engaged in "jawboning" to encourage the construction, the government did not guarantee petitioners an operating license and never entered into a contract (express or implied) with petitioners. In the absence of such a contract or promise, the court held, the government is not liable for petitioners' losses.

ARGUMENT

The judgment of the court of appeals is correct. Its decision does not conflict with any decision of this Court or any other court of appeals. Thus, no further review is warranted.

1. The government "did not occupy, use, or in any manner take physical possession of the [Barnwell plant]." *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 165-166 (1958).[3] Nor has the Commission issued a

[3] The AEA expressly provides that the Commission must pay just compensation if it occupies or operates a private nuclear facility. See 42 U.S.C. 2236(c), 2238.

final order denying petitioners' application for an operating license. At bottom, therefore, petitioners' claim is that they expected to receive an operating license in the late 1970s when the Barnwell plant was nearing completion, and that the Commission's failure to issue a license at that time was a taking of the Barnwell plant. Petitioners' claim is meritless because they knowingly assumed the investment risk that the Commission, acting within its statutory mandate, would not issue an operating permit when the plant reached completion.

The AEA (42 U.S.C. 2131) prohibits the operation of a nuclear fuel reprocessing plant without a license from the Commission. When Congress adopted the AEA in 1954, it was aware that companies wishing to build nuclear facilities would have to make substantial investments in construction with no assurance of an operating permit. Congress enacted the law over the objection of witnesses who complained that "a company might invest large sums in construction of a [facility], and then be denied the right to operate it." *Power Reactor Development Co.* v. *International Union of Electrical Workers,* 367 U.S. 396, 410 (1961). Consequently, as this Court observed in *Power Reactor Development Co.,* a holder of a construction permit is "on notice * * * that it proceeds with construction *at its own risk,* and that all its funds may go for naught" (*id.* at 415 (emphasis added)). In this case, petitioners "willingly accepted that risk, however great" (*ibid.*).[4]

Furthermore, petitioners had notice that the Commission has broad authority to issue any order "to promote the common defense and security or to protect health or to minimize danger to life or property" (42 U.S.C. 2201(b)).

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[4] We do not dispute that the Barnwell plant is property. But that plant's value as a reprocessing facility has always been dependent on the Commission's issuance of a license.

And the Commission, in reviewing applications for operating licenses, is required under the AEA to deny the license if "the issuance of a license * * * would be inimical to the common defense and security * * * of the public" (42 U.S.C. 2133(d)). Thus, petitioners were fully aware that the Commission could deny an operating license on the ground that nuclear fuel reprocessing creates an unacceptable risk of the spread of nuclear weapons. Accordingly, the Commission's decision not to issue a permit to operate the Barnwell plant in the late 1970s, while the Commission studied the proliferation risk, was well within the range of the Commission's discretion as defined by the AEA and substantially advanced the statutory policies of the AEA. *Westinghouse Elec. Corp.* v. *United States, supra.*

Indeed, petitioners had particular notice of the risk associated with building the Barnwell plant. Shortly after construction began in 1971, the Commission allowed petitioners to "proceed with construction at their own risk" while the Commission considered the environmental impact of the plant (36 Fed. Reg. 23333 (1971)). The Commission's review of the widespread implications of plutonium reprocessing continued throughout the 1970s. During that process, the Commission's attention was focused on the danger that plutonium could be diverted and used to build nuclear weapons. See page 4, *supra.* Thus, the Commission's decision in late 1977 to suspend licensing proceedings on reprocessing facilities had deep and public roots. Petitioners' investment in the Barnwell plant was surely affected. But petitioners never had the right to use its Barnwell plant to reprocess nuclear fuel. The value of petitioners' investment in the facility was always dependent on petitioners securing an operating license. And petitioners "willingly accepted th[e] risk" (*Power Reactor Development Co.,* 367 U.S. at 415) that the Commission would not issue such a license at the time of petitioners' choice.

This Court's decision in *Ruckelshaus* v. *Monsanto,* 467 U.S. 986 (1984), forecloses petitioners' argument that its property has been taken. In *Monsanto* the Court addressed a claim that the government took Monsanto's property interest in trade secrets, submitted to the government by Monsanto to register its pesticides, when the government considered those secrets in evaluating other applications for registrations. The Court rejected the takings claim specifically on the ground that a federal statute authorized the government to use and disclose trade secrets submitted in connection with an application to register pesticides. The Court stated that "as long as Monsanto is aware of the conditions under which the [trade secret] data are submitted, * * * a voluntary submission of data by an applicant * * * can hardly be called a taking" (467 U.S. at 1007).[5] The Court observed that "Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the * * * statute" (*id.* at 1006).[6] See also *Connolly* v. *Pension Benefit Guaranty Corp.,* 475 U.S. 211, 226-227 (1986) (prior notice weighs against the finding of a taking).

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[5] The Court concluded that Monsanto did not have sufficient notice of the government's use of Monsanto's data for the period between October 22, 1972, and September 30, 1978. Thus, the Court held that the government's use of data submitted during that period may constitute a taking. See 467 U.S. at 1010-1014.

[6] In *Monsanto,* the government appropriated private property but the Court held that there was no taking because Monsanto knowingly accepted such appropriation in return for the benefit of a pesticide registration. In this case, petitioners similarly sought a license that would enhance the value of their property, but—in contrast to the situation in *Monsanto*—the government has not in any way appropriated any of petitioners' property. Thus, there plainly is no requirement that petitioners receive something of value in exchange for the Commission's decision not to issue an operating license in the late 1970s.

Here, petitioners built the Barnwell plant while they were fully "aware of the conditions under which" (*Monsanto,* 467 U.S. at 1007) they could operate the plant. They were aware that the Commission, acting in accordance with the provisions of the AEA, might not issue an operating permit. Petitioners, therefore, "could not have had a reasonable, investment-backed expectation that" (*id.* at 1006) the Commission would necessarily permit operation of the plant once it was constructed. See generally *Andrus* v. *Allard,* 444 U.S. 51, 64-65 n.21 (1979) ("[t]he timing of acquisition of [property] is relevant to a takings analysis of [the owner's] investment-backed expectations"). Accordingly, the Commission's actions did not constitute a taking of petitioners' property.[7]

2. Petitioners primarily challenge (Pet. 12-16) an independent ground of the court of appeals' judgment. They assert that the court of appeals erred in stating that there was no taking of petitioners' property because the Commission's moratorium on licensing nuclear fuel reprocessing plants was prompted by concerns for public safety and was designed to avoid a public nuisance—*i.e.,* the spread of nuclear weapons. Petitioners' assertion, however, is not squarely presented for review because the court of ap-

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[7] Contrary to petitioners' suggestion (Pet. 17-18), this Court's decision in *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985), is not inconsistent with this result. In *Riverside,* the Court observed that a taking may occur when a landowner is denied permission to put his land to any "productive use" (*id.* at 127 n.4). In this case, petitioners have not shown that they were denied all productive use of their land. Rather, they assert (Pet. 18-19) that the Barnwell plant's value was affected by the Commission's actions. But the plant's value as a reprocessing facility was always dependent on petitioners obtaining an operating license. Thus, unlike the situation contemplated in *Riverside Bayview Homes,* the plant never had an independent market value that was affected by the Commission's actions.

peals' independent ground for its judgment, discussed in point 1, *supra,* is plainly correct.

In any event, the court of appeals' alternative reasoning is also supported by this Court's precedents. In *Mugler* v. *Kansas,* 123 U.S. 623 (1887), this Court considered a takings claim by owners of breweries. They claimed that their property had been taken when Kansas adopted a constitutional amendment prohibiting the manufacture of intoxicating liquors. In rejecting the takings claim, the Court stated: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit" (*id.* at 668-669).

In *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* No. 85-1092 (Mar. 9, 1987), slip op. 17, this Court rejected a claim that *Mugler* and its progeny had been implicitly overruled. The Court reaffirmed those decisions "which focus[ ] so heavily on the nature of the [government's] interest in the regulation" (*ibid.*). Accordingly, the court of appeals followed this Court's decisions in *Keystone Bituminous Coal Ass'n* and *Mugler* in ruling that the Commission's actions, which were authorized by the AEA and were designed to protect the public from the spread of nuclear weapons, did not constitute a taking of private property. Cf. *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155 (1958) (government order closing gold mines during World War II was not a taking).[8]

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[8] Petitioners argue (Pet. 15-16) that the Commission's actions cannot be justified as designed to promote public safety and the nation's defense because President Reagan changed presidential policy in 1981 when he supported nuclear fuel reprocessing. As we have noted, however, petitioners have not renewed their efforts to obtain an operating license and have apparently abandoned the Barnwell project for economic reasons. See C.A. App. 317. Petitioners have not sought

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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judicial review of the Commission's actions since the Third Circuit's decision in *Westinghouse Elec. Corp.* v. *NRC*, *supra*. And, of course, the mere fact that there has been a change of presidential policy does not mean that the preceding policies were not valid and lawful. For present purposes, therefore, the Court must assume that the Commission has always acted reasonably and within the confines of the AEA.

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